

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MATTHEW T.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH No. 2012080525

DECISION

Administrative Law Judge Michael A. Scarlett, Office of Administrative Hearings, State of California, heard this matter on December 12, 2012, in Van Nuys, California. Rhonda Campbell, Contract Officer, represented North Los Angeles County Regional Center (Service Agency or NLACRC). Matthew T. (Claimant), who was not present at the hearing, was represented by Mina T., Claimant's mother (Mother).¹ Claimant's brother, Joseph T., also attended the hearing to assist Mother in representing Claimant.

Oral and documentary evidence was received and the record was closed and submitted for decision on December 12, 2012.

ISSUE

Does Claimant have a developmental disability entitling him to eligibility for regional center services?

¹ Claimant's and Claimant's mother's last initials are used in this Decision in lieu of their surnames to protect their privacy.

FACTUAL FINDINGS

1. Claimant is a 31 year-old single adult male who currently resides with his mother and father. Claimant has one brother, Joseph T., who does not have a developmental disability. There is no history of developmental disability on Claimant's mother or father's side of the family. Claimant's mother contends that he was diagnosed with an Autistic Disorder in 2003, and that he was not diagnosed as a child because the school district was less familiar with autism when Claimant attended school and misdiagnosed him as having a learning disability.

2. On July 24, 2012, Service Agency determined that Claimant was not eligible for regional center services because he does not suffer from a qualifying developmental disability. Service Agency denied services to Claimant and issued a Notice of Proposed Action (NOPA) on July 24, 2012. On August 9, 2012, Claimant submitted a timely request for fair hearing. All jurisdictional requirements have been satisfied.

3. Mother stated that Claimant had speech delay as a child and received speech therapy throughout his childhood both privately and at school. She could not recall when Claimant spoke his first words, but recalled that he was three years old before he put two words together and required speech therapy for many years before he was able to speak in a complete sentence. Mother stated Claimant was always in physical therapy when he was a child but he is currently fully ambulatory with no apparent limitations with his motor skills. Mother recalled that, as a child, Claimant shared with other children if he was asked and sometimes offered comfort to other children. She stated that Claimant played with children at birthday parties, but she could not recall whether Claimant showed interest or played pretend by himself or imitated social play of others. Claimant makes good eye contact, and smiles back at others and shares enjoyment with some people.

4. Currently, Claimant attends to all of his self-care needs with prompting, but he has no sense of timing and needs reminding to take showers. He has difficulty remembering appointments. Claimant will help with household chores but needs repeated reminding before he performs tasks such as washing his clothes, vacuuming, and taking out the trash. Claimant is able to feed himself and can prepare simple meals. He has no concept about a household budget or how to purchase foods for the home. He needs assistance in managing his own money. He does not use public transportation, but he is able to drive a car and has a driver's license.

5. According to Mother, Claimant currently has no friends and cannot participate in conversations with his peers, cannot sustain conversations, and stutters a lot. Mother states he sometimes repeats phrases or ideas of others. If Claimant becomes interested in something, he becomes obsessed with it. Mother states that his computer at home has to be aligned a certain way, but there are no other reported nonfunctional routines or rituals. There are no repetitive or stereotyped motor movements reported now or previously. Claimant collects movie ticket stubs and packets from shows. Claimant has not been able to sustain employment because Mother states that he is irresponsible. The only real employment he

ever had was a job with his parents. Claimant currently receives Employment Development Disability (EDD) payments and living on support assistance from his family.

6. Claimant was enrolled in the Los Angeles Unified School District (LAUSD) from 1988 through 2000. All of his Individualized Education Programs (IEPs), first through twelfth grades, were admitted into evidence. The IEPs indicated that he had a learning disability and other health impairment (OHI). Claimant was initially assigned to a regular education classroom and placed in the resource specialist program for language and reading. He later began receiving special education services in the area of speech and language but was always primarily assigned to a regular education classroom.

7. Claimant consistently functioned in the “average range of general ability” from 1988, first grade, until his graduation from high school in 2000. The IEPs noted that there was a significant discrepancy between his general ability and his academic achievement. The 1989 second grade IEP indicated that Claimant’s developmental milestones were within normal limits. Although there were always concern about Claimant’s academic performance, specifically in the areas of reading comprehension and spelling/written language skills, these concerns were primarily attributed to his learning disability and a psychological processing disorder in sensory motor integration. Claimant had visual and motor skills deficits with short term memory deficits and auditory discrimination weaknesses. These deficits caused Claimant to be distracted and unable to focus in the classroom, which ultimately required that Claimant be given additional time to perform tasks, as well as additional time during test taking. In 1998, Claimant’s tenth grade year, his IEP indicated that he had “an outstanding year overall and has been successful in all general education settings and in class work and completing homework. Matthew benefits from extended due dates.” Claimant’s 1999 eleventh grade IEP indicated that he “appears to demonstrate a learning disability, specifically in the visual channel for learning, and a significant discrepancy between his intellectual ability and academic achievement in reading skills, reading comprehension, writing skills and spelling.”

8. In 1988, in the first grade, Claimant was at least two years below age level after his adaptive physical education (APE) assessment. He received APE until his 1993 IEP, sixth grade, at which time it was indicated he had reached his goals and no longer qualified for APE on the basis of his OHI eligibility.

9. Starting 1989, the second grade, Claimant met the criteria for Language and Speech (LAS) services and based upon his “mild dysfluencies.” But his receptive and expressive language was within normal limits for his age. In December 1991, while in fourth grade, Claimant’s speech and language assessment indicated he had reached his speech goals and recommended his dismissal from the speech and language program. The December 1991 IEP and speech and language assessment indicated Claimant’s speech difficulties may have been related to English being his second language and the presence of Russian being spoken within the home. In 1996, his eighth grade year, Claimant demonstrated moderate delays in receptive and expressive language skills and he was again recommended for speech and language services. He received speech and language services until 1998, his tenth grade

year of high school. At that time, the IEP indicated that Claimant's speech had improved significantly and that he was fluent and no longer needed speech and language services. It was noted that Claimant no longer stuttered, or did not stutter during his classes, but that he would continue to benefit from assistance with his oral presentations. However, Claimant's 1999 and 2000 eleventh and twelfth grade IEPs indicated that he had again developed a stutter or mild dysfluencies.

10. Claimant's IEPs consistently indicated that he interacted with his peers in social situations and during group exercises in the classroom environment, although the IEPs frequently noted that he showed immaturity in academic situations. His teachers repeatedly made positive comments regarding Claimant's social and emotional qualities such as: Claimant was a "sweet and compliant child" (1988 first grade IEP); "Matthew is a happy, enthusiastic student who is willing to participate in all activities...he gets along well with peers Is very considerate to others" (1990 third grade IEP); "Matthew continues to show enthusiasm towards learning and willingness to participate in most activities Matthew continues to get along well with peers and continues to try to be very considerate of others as well as willing to help other peers" (1991 fourth grade IEP); "Matthew has become more responsible for himself. He has become more independent and has shown more willingness to make friends and show positive peer relations" (1993 sixth grade IEP); "He is a nice, well mannered, polite lad. He is eager as a student and wants to do well.....He is constantly growing and succeeding in his social and academic abilities" (1995 seventh grade IEP); "Teachers report Matthew to be cooperative and a pleasure to have in class" (1996 eighth grade IEP); "Matthew has improved academically and socially this year. Matthew has friends among his peers and demonstrates strong study and work habits interested in learning, tries hard. A pleasure to have in class" (1997 ninth grade IEP); "Matthew is a pleasure to have in class, cooperative, well behaved, positive attitude" (1998 Speech and Language Assessment.)

11. Claimant ultimately graduated from high school with his diploma. He attended California State University at Northridge for two years, but could not keep up academically or socially. Claimant successfully passed an Autocad training and worked with his family using those skills briefly. He also completed a Bartending program, but could not hold a job as a bartender because of limitations in his social and communication skills. Claimant is currently unemployed.

12. On May 15, 2012, Claimant was assessed by Dr. Anna Levi, Psy.D. to determine his current levels of functioning and to assess for a possible Autistic Disorder. Dr. Levi administered the Wechsler Abbreviated Scale of Intelligence (WASI), the Autism Diagnostic Observation Schedule – Generic, Module 4 (ADOS-Module 4), the Autism Diagnostic Interview-Revised (ADI-R) (Mother as Respondent), and the Adaptive Behavior Assessment System (ABAS-II) (Mother as Respondent). Dr. Levi diagnosed Claimant with Pervasive Developmental Disorder Not Otherwise Specified. The WASI showed Claimant's overall intellectual abilities were in the low borderline range, nonverbal abilities were high borderline range and verbal abilities were in the low borderline range. Claimant demonstrated strength in nonverbal reasoning in completing visual patterns. The ABAS-II

results of adaptive functioning, based upon Mother's responses, measured in the low borderline range. Claimant's conceptual skills were low borderline range, his social skills were in the mild deficit range, and his practical skills were in the low average range. Claimant's communication and language skills were low average, his social skills were deficient because of his lack of friends or interaction with peers, and his self-care skills were low average. Based on the WASI and the ABAS-II test results, Dr. Levi concluded that Claimant was not mentally retarded.

13. Claimant's test results on the ADOS Module-4 indicated communication scores in the autism spectrum range (below the autism cutoff), but scores in social interaction reached the autism cutoff. Claimant scored a "2" on the Communication schedule, with the autism cutoff being a "3," and a "6" on the Social Interaction schedule, with the autism cutoff being a "6." Overall Claimant scored an "8" on the ADOS Module-4. The autism cutoff for this test was an overall score of "10," with Claimant scoring below the necessary autism cutoff score. The ADI-R based upon Mother's responses indicated communication and repetitive behavior areas met the autism cutoff, although the score in social interaction was below the autism cutoff.

14. The evidence did not establish that Claimant is mentally retarded or suffers from a condition similar to mental retardation or requires treatment similar to treatment that would be required for a person with mental retardation. Dr. Levi concluded that Claimant did not have significant "sub-average intellectual functioning with concurrent deficits in adaptive functioning." Claimant does not dispute Service Agency's determination that Claimant is not eligible for services based upon mental retardation or fifth category eligibility. There was also no medical evidence or otherwise to support eligibility based upon cerebral palsy or epilepsy. On May 3, 2012, Dr. Carlo De Antonio reviewed the available medical records provided by Claimant and concluded there was no indication of substantially handicapping cerebral palsy or epilepsy. Claimant offered no medical evidence to the contrary to support a diagnosis of cerebral palsy or epilepsy.

15. The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, 4th Edition, Text Revision (DSM-IV-TR) states that "the essential features of Autistic Disorder are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activity and interests." The DSM-IV-TR describes the diagnostic criteria for autism to include the following:

- A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):
 - (1) qualitative impairment in social interaction, as manifested by at least two of the following:

- (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction;
 - (b) failure to develop peer relationships appropriate to developmental level;
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);
 - (d) lack of social or emotional reciprocity;
- (2) qualitative impairments in communication as manifested by at least one of the following:
- (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);
 - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;
 - (c) stereotyped and repetitive use of language or idiosyncratic language;
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level;
- (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals;
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);
 - (d) persistent preoccupation with parts of objects;
- B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.
- C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

(DSM-IV-TR at pp. 70-71, and 75.)

16. Dr. Levi's psychological assessment indicated that Claimant had a qualitative

impairment in the social interaction criterion in two areas: (1) his failure to develop peer relationships because Claimant had no friends, and (2) lack of social or emotion reciprocity based upon his inability to reciprocate effectively with others when interacting. Claimant also had a qualitative impairment in the communication criterion based upon (1) his marked impairment in the ability to sustain conversations with others, as he could not sustain conversations with the assessor/examiner or reported with any other person or peers, and (2) his stereotypic and repetitive use of language as he sometimes repeat others' phrases or ideas per Mother's reports, although the examiner/assessor did not see any indication of this impairment during the psychological assessment. Dr. Levi concluded that Claimant did not meet the third criteria for autism, the restricted repetitive and stereotyped patterns of behavior, interests, or activities. She found no reported or observed inflexibility to specific nonfunctional routines or rituals by Claimant, there were no encompassing preoccupations observed or reported, Claimant had no significant stereotyped or repetitive motor mannerisms either currently or previously, and he displayed no prior or current repetitive use of objects or preoccupations with parts of objects. Dr. Levi noted that his collection of movie tickets or packets did not meet this criterion. Based on these findings, specifically Claimant's failure to show impairment in the area of restricted repetitive and stereotyped patterns of behavior, interests, and activities, Dr. Levi concluded Claimant did not meet the DSM-IV-TR criteria for a diagnosis of Autistic Disorder.

17. Claimant began seeing Dr. Jose Martin I. Schuster, M.D., psychiatrist, and Dr. Perri W. Johnson, Ph.D., psychologist, in 2003. Mother stated Claimant started seeing these doctors because it became apparent when he was about 20 years old that he could not care for himself as an adult. Both Dr. Schuster and Dr. Johnson submitted letters dated November 21, 2012, and September 4, 2012, respectively, stating that Claimant had been diagnosed with an Autistic Disorder. Both indicated that they began seeing Claimant in 2003, suggesting that Claimant's first diagnosis for Autistic Disorder did not occur until he was around 22 years old. Neither doctor indicated what diagnostic tests were used to reach their diagnoses of an Autistic Disorder or the results of such testing. No psychological evaluations or assessments by either Dr. Schuster or Dr. Johnson were offered into evidence. The letters by Dr. Schuster and Dr. Johnson simply stated that Claimant had been diagnosed with an Autistic Disorder.

18. Claimant failed to establish that he suffers from a developmental disability that renders him eligible for regional center services. Claimant's educational records (IEPs) indicated that he had a learning disability and OHI based upon speech and language deficiencies and psychological processing disorder in sensory motor integration. The May 15, 2012, psychological evaluation by Dr. Levi did not establish that he had autism, mental retardation, or fifth category eligibility. Instead Dr. Levi concluded that Claimant had a Pervasive Developmental Disorder Not Otherwise Specified, which is a severe and pervasive impairment in the development of reciprocal social interaction associated with either verbal or nonverbal communication skills, or with the presence of stereotyped behavior, interests, and activities. Dr. Levi's diagnosis is consistent with the assessments and observations contained in Claimant's LAUSD IEPs from 1988 until 2000, which indicated social interaction limitations due to both verbal and nonverbal communication deficits.

19. Claimant relied on two 2003 diagnoses of autism that were made when he was 22 years old. Those diagnoses were not persuasive because they lacked supporting assessments/evaluations and test results. The diagnoses also did not establish that Claimant suffered from delays or abnormal functioning in social interaction, language as used in social communication, or symbolic or imaginative play with an onset by the age of three years old, which is required under the DSM IV-TR criteria for an Autistic Disorder. To qualify for regional center eligibility, a developmental disability must have manifested itself before the applicant has reached the age of 18. There is insufficient evidence to establish that Claimant had a qualifying developmental disability as a child prior to the age of 18, or prior to the age of three in the case of an Autistic Disorder. Consequently, Claimant does not qualify for regional center services.

LEGAL CONCLUSIONS

1. Claimant has not established that he suffers from a developmental disability entitling him to regional center services. (Factual Findings 1 through 19.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700 - 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. Where a Claimant seeks to establish his eligibility for services, the burden is on the appealing Claimant to demonstrate that the Service Agency's decision is incorrect. Claimant has not met his burden of proof in this case.

3. To be eligible for regional center services, a Claimant must have a qualifying developmental disability. Welfare and Institutions Code section 4512² defines "developmental disability" as:

a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual, and includes mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

4. To prove the existence of a developmental disability within the meaning of section 4512, a Claimant must show that he has a "substantial disability." Section 4512,

² All further references are to the Welfare and Institutions Code unless otherwise indicated.

subdivision (l), and California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

5. Claimant must show that his “substantial disability” fits into one of the five categories of eligibility in section 4512. These categories are mental retardation, epilepsy, autism and cerebral palsy, and a fifth category of eligibility described as having “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512.) The fifth category requires that the qualifying condition be “closely related” (Welf. & Inst. Code, § 4512) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512.) Under the Lanterman Act, “developmental disability” excludes conditions that are *solely* physical in nature. (Welf. & Inst. Code, § 4512, and Cal. Code. Regs., tit. 17, § 54000). California Code of Regulations, title 17, section 54000, also excludes conditions that are *solely* psychiatric disorders or *solely* learning disabilities.


6. Claimant has not established that he qualifies for regional center services based upon a diagnosis of autism, or any other basis for eligibility under the Lanterman Act. Claimant was diagnosed in 2003 by two separate doctors with an Autistic Disorder. However, these diagnoses were not supported by psychological evaluations or assessments, or any information regarding the tests administered or tests results to support their diagnoses. Dr. Levi’s psychological evaluation and Claimant’s LAUSD IEPs did not establish that Claimant had an Autistic Disorder or any other qualifying developmental disability upon which eligibility of regional center services could be based. Dr. Levi’s evaluation concluded

that he did not meet the third criteria for autism, an impairment based upon restricted repetitive and stereotyped patterns of behavior, interests, or activities. Dr. Levi concluded that the collection of movie tickets and packets did not satisfy this criterion and there was insufficient evidence to refute Dr. Levi's finding. Thus, Claimant did not meet the necessary criteria for a diagnosis of Autistic Disorder. Instead Dr. Levi diagnosed Claimant with a Pervasive Developmental Disorder Not Otherwise Specified. This diagnosis is consistent with other evidence in the record, including Claimant's IEPs from LAUSD from 1988 to 2000. There was also insufficient evidence to establish that Claimant suffered from a qualifying developmental disability prior to reaching the age of 18 years-old, or prior to three years-old with regards to an Autistic Disorder.

ORDER

The Service Agency's determination that Claimant is not eligible for regional center services is upheld. Claimant's appeal is denied.

DATED: February 25, 2013



MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.